Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**)**	
	)	
2000 Biennial Regulatory Review	**)**	**CC Docket No. 00-175**
Separate Affiliate Requirements of Section	**)**	
64.1903 of the Commission's Rules	**)**	

COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION

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Summary

The structural separation requirements are an extraordinary remedy for a concern that has long ago been supplanted by market, technological and regulatory changes. After concluding in the *USTelecom Forbearance Order* that such rules should not apply to price cap carriers, the Commission declined to apply similar relief to rate-of-return carriers providing facilities-based in-region, interexchange, interstate long distance services. The requirements are currently imposed on a small subgroup of small incumbent local exchange carriers. The National Exchange Carrier Association (NECA) estimates that only a negligible portion of the more than 1,000 carriers that participate in NECA's traffic sensitive pool are subject to the requirement.

Despite the fact that no commenters objected to the elimination of this requirement, the Commission justified the continuation of structural separation by raising the specter of "the continuing potential for cost misallocation." In particular, it noted the findings in the *LEC Classification Order* concerning the need to protect against the exercise of exclusionary market power by independent ILECs and specifically raised anticompetitive concerns. It is inconceivable that such a small portion of the competitive communications marketplace – predominantly located in rural areas – "continue to have the ability and incentive to engage in anticompetitive behavior."

As a threshold matter, the Commission has never found that independent LECs are dominant in the provision of in-region, interexchange services based on any market analysis. In its *Competitive Carrier First Report and Order*, which created the dominant/non-dominant regulatory regime more than 30 years ago, the Commission classified independent LECs and pre-divestiture AT&T as dominant, with respect to both local exchange and interstate long distance services. However, this classification was based solely on the Commission's determination that independent LECs at that time "share[d] in AT&T's market power" by virtue of their offering "interstate services essentially on a non-competitive, cooperative basis with Bell, generally agreeing to Bell tariffs." Because it was premised upon a pre-divestiture market structure that has no relevance in today's marketplace, this determination cannot reasonably justify the application of dominant carrier regulation to incumbent LECs that offer interstate long distance services on an integrated basis.

In the *Competitive Carrier Fifth Report and Order*, which established the structural separation requirements currently codified in section 64.1903, the Commission did not conduct any market analysis in determining whether independent LECs possessed classical market power in the provision of interstate long distance services (*i.e.*, the power to control price). Instead, based on the framework adopted in the *Competitive Carrier First Report and Order*, the Commission simply declared – without any analysis or market data – that "[i]nterstate services provided directly by exchange telephone companies (not through affiliates) are regulated as dominant." In subsequent orders, the Commission concluded that independent LECs do not have the ability to raise prices by restricting their own output and that vibrant competition exists for interstate long distance services for both mass market and enterprise customers.

Structural separation obligations impose significant costs to carriers subject to these requirements. The answer to the Commission's question as to whether the "prohibition significantly limit[s] the independent ILEC's opportunities to take advantage of economics of scope and scale associated with integrated operations" is clearly yes. How can it not when duplicative switching and transmission equipment and separate management structures are required? These are exactly the type of costs which the Commission has attempted to reduce with various mechanisms in the universal service high-cost context.

Such costs are particularly acute for the rate-of-return carriers at issue here, given their presence in rural areas where the costs associated with broadband deployment are the most significant. A reduction in costs for these carriers is crucial to enabling them to enhance and expand broadband service to the most challenging regions in which to deploy broadband networks.

The cost issue is of particular significance given that the Commission's USF Transformation Order places great emphasis on controlling rate-of-return company costs through the quantile regression analysis. The Commission states that it will "place limits on the [high-cost loop support] provided to carriers whose costs are significantly higher than other companies that are similarly situated, and support will be redistributed to those carriers whose unseparated loop cost is not limited by operation of the benchmark methodology." Given this constraint, it is imperative that the Commission identify ways – such as the removal of structural separation obligations – to allow rate-of-return carriers to achieve this goal. If the Commission has concerns about cost-shifting between regulated and non-regulated services of rate-of-return companies, it should not disguise such concerns applicable to one service offered by a small segment of the RLEC industry with arguments and remedies dredged up from a telecommunications world that no longer exists.

The Commission has many other tools to address its concerns, and should not apply the most onerous of regulatory remedies to address a problem that was never substantiated in the first place, and bears no relevance to today's telecommunications marketplace. Structural separation for rate-of-return companies should be promptly eliminated.

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COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTelecom)[1] submits these comments in response to the Federal Communications Commission's (Commission) Notice of Proposed Rulemaking (*Notice*)[2] seeking comments on whether the structural separation requirements contained in its rules should continue to apply to independent incumbent local exchange carriers subject to rate-of-return regulation.

I. Background

The structural separation requirements are an extraordinary remedy for a concern that has long ago been supplanted by market, technological and regulatory changes. After concluding in the *USTelecom Forbearance Order* that such rules should not apply to price cap carriers, the

[1] USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

[2] Second Further Notice of Proposed Rulemaking, *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations, et. al.*, 28 FCC Rcd 7627, FCC 13-69, ¶¶ 211 – 243 (2013) (*Notice*).

Commission declined to apply similar relief to rate-of-return carriers providing facilities-based in-region, interexchange, interstate long distance services.[3]

Despite the fact that no commenters objected to the elimination of this relief, the Commission justified the continuation of the penultimate regulatory safeguard of structural separation (just short of not permitting RLECs to provide facilities-based long-distance service, or requiring divestiture of their long distance operations) by raising the specter of "the continuing potential for cost misallocation."[4] In particular, it noted the findings in the *LEC Classification Order* concerning the need to protect against the exercise of exclusionary market power by independent ILECs and specifically raised these concerns (1) the ability to raise rivals' costs of providing competitive services, including the misallocation of costs (e.g., misallocated costs from non-regulated to regulated services), (2) non-price discrimination (e.g., lower quality wholesale service provided to a competitor), (3) and price squeeze based on inputs that long distance competitors need, such as access services (e.g., raising prices for access services, including both switched and special access, or reducing prices for retail services).[5]

The Commission's structural separation requirements for rate-of-return carriers are currently imposed on a small subgroup of small incumbent local exchange carriers. The National Exchange Carrier Association (NECA) estimates that only a negligible portion of the

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[3] Memorandum Opinion and Order and Report and Order, *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations, et. al*., 28 FCC Rcd 7627, FCC 13-69, ¶¶ 1 – 193 (2013) (*USTelecom Forbearance Order*); *see also*, Id., ¶¶ 135 – 162.

[4] *USTelecom Forbearance Order*, ¶ 139.

[5] *See*, *Notice*, ¶¶ 237 – 243.

more than 1,000 carriers that participate in NECA's traffic sensitive pool fall into this category.[6] Moreover, the Commission acknowledges in the *Notice* that the rate-of-return carriers subject to these structural separation rules are "typically small, rural telephone companies concentrated in one area."[7] It is inconceivable that such a small portion of the competitive communications marketplace – predominantly located in rural areas – "continue to have the ability and incentive to engage in anticompetitive behavior."[8]

II. History of the Structural Separation Requirement

The structural separation requirements found in Section 64.1903 of the Commission's rules,[9] stemmed from a concern that an ILEC's control of bottleneck local access facilities could give it the incentive and ability to distort interexchange competition by (1) misallocating long distance costs to monopoly local exchange series, (2) discriminating against long distance competitors in the provisioning of exchange and exchange access services, or (3) initiating a price squeeze to increase its long distance share.[10] Although the Commission did not find that this behavior was actually occurring, it determined that the Section 64.1903 requirements "would aid in the detection and prevention of such anticompetitive conduct" and that any burdens

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[6] See, USTelecom Ex Parte Notice, *Petition of the United States Telecom Association for Forbearance From Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, March 28, 2013, p. 1.

[7] *Notice*, ¶ 5.

[8] *Notice*, ¶ 3.

[9] 47 C.F.R. § 64.1903.

[10] *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149, 96-61, 12 FCC Rcd. 15756, 15848-49 ¶¶ 159-161 (1997) ("*LEC Classification Order*").

imposed on ILECs as a result of the rules would not be unreasonable in light of the resulting protections. *LEC Classification Order*, ¶¶ 163 & 167.

A decade ago, the Commission initiated a proceeding to reexamine Rule 64.1903.[11] That proceeding remains pending. In the interim, however, the Commission allowed the ROCs and their independent ILEC affiliates to provide in-region, interstate, and international, long distance services on an integrated basis without being subject to dominant carrier regulation as long as they complied with certain targeted safeguards as well as with other continuing statutory and regulatory obligations. The *USTelecom Forbearance Order* completed the task of eliminating this outdated requirement for price cap companies, granting all remaining price cap companies relief from structural separation,[12] leaving only the tiny portion of the market served by a few rate-of-return carriers with facilities-based long-distance service with this onerous regulatory burden.

III. There is No Legal Basis to Continue to Apply Structural Separation to Rate-of-Return Companies

As a threshold matter, the Commission has never found that independent LECs are dominant in the provision of in-region, interexchange services based on any market analysis. In its *Competitive Carrier First Report and Order*, which created the dominant/non-dominant regulatory regime more than 30 years ago, the Commission classified independent LECs and pre-divestiture AT&T as dominant, with respect to both local exchange and interstate long distance

[11] *See 2000 Biennial Regulatory Review of Separate Affiliate Requirement of Section 64.1903 of the Commission's Rules*, Notice of Proposed Rulemaking, 16 FCC Rcd. 22745 (2001).
[12] *USTelecom Forbearance Order,* ¶ 139.

services.[13] However, this classification was based solely on the Commission's determination that independent LECs at that time "share[d] in AT&T's market power" by virtue of their offering "interstate services essentially on a non-competitive, cooperative basis with Bell, generally agreeing to Bell tariffs."[14] Because it was premised upon a pre-divestiture market structure that has no relevance in today's marketplace, this determination cannot reasonably justify the application of dominant carrier regulation to incumbent LECs that offer interstate long distance services on an integrated basis.

Likewise, in the *Competitive Carrier Fifth Report and Order*, which established the structural separation requirements currently codified in section 64.1903, the Commission did not conduct any market analysis in determining whether independent LECs possessed classical market power in the provision of interstate long distance services (*i.e*., the power to control price). Instead, based on the framework adopted in the *Competitive Carrier First Report and Order*, the Commission simply declared – without any analysis or market data – that "[i]nterstate services provided directly by exchange telephone companies (not through affiliates) are regulated as dominant."[15]

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[13] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980) (*"Competitive Carrier First Report and Order"*); *see also* Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*"Competitive Carrier Fourth Report and Order"*), *vacated, AT&T v. FCC* 978 F.2d 727 (D.C. Cir. 1992), *cert. denied, MCI Telecommunications Corp. v. AT&T*, U.S., 13 S. Ct. 3020 (1993); Competitive Carrier Fifth Report and Order, 98 FCC 2d 1191 (1984) ("*Competitive Carrier Fifth Report and Order*"); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated, MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

[14] *Competitive Carrier First Report and Order* ¶ 65.

[15] *Competitive Carrier Fifth Report and Order* ¶ 9.

In the *LEC Classification Order*, after analyzing "traditional market power factors – market share, supply and demand substitutability, cost structure, size, and resources --," the Commission concluded that "independent LECs do not have the ability to raise prices by restricting their own output."[16] More recently, in the *272 Sunset Order*, the Commission found that vibrant competition exists for interstate long distance services for both mass market and enterprise customers.[17]

IV. The Structural Separations Requirements Clearly and Unnecessarily Add Costs to Rate-of-Return Carriers

Structural separation obligations impose significant costs to carriers subject to these requirements. The answer to the Commission's question as to whether the "prohibition significantly limit[s] the independent ILEC's opportunities to take advantage of economics of scope and scale associated with integrated operations"[18] is clearly yes. How can it not when duplicative switching and transmission equipment and separate management structures are required? These are exactly the type of costs which the Commission has attempted to reduce with various mechanisms in the universal service high-cost context. Additionally, these requirements add costs and deter innovation by complicating the provision of new services.

For example, every time a company considers a new service that may invoke an interexchange service, the company must dedicate lawyers, engineers and other personnel to

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[16] *LEC Classification Order* ¶ 157.

[17] *272 Sunset Order* ¶¶ 36-37 (noting that competition aced by Verizon and AT&T within their respective franchise areas from a variety of providers, including: (i) for mass market services, "competitive wireline local exchange and long distance carriers, stand-alone long distance providers, facilities-based VoIP providers, cable circuit-switched service providers, and wireless carriers, to the extent that consumers use their services as a replacement for local or long distance services"; and (ii) for enterprise services, "interexchange carriers, competitive LECs, data/IP network providers, cable companies, other incumbent LECs and VoIP providers").

[18] *Notice*, ¶ 10.

figure out whether the service implicates the separate affiliate rule, and if so, whether the service can be offered in a way that complies with the rules. Typically, designing the service to comply further adds costs.

Such costs are particularly acute for the rate-of-return carriers at issue here, given their presence in rural areas where the costs associated with broadband deployment are the most significant. A reduction in costs for these carriers is crucial to enabling them to enhance and expand broadband service to the most challenging regions in which to deploy broadband networks. Given the Commission's significant efforts to promote rural broadband deployment, it is counterproductive to the Commission's goals for it to continue to impose onerous and costly structural separation requirements on rate-of-return carriers.

At a time when the Commission has expressed particular concern with RLEC costs and adopted mechanisms to address what it considers to be excessive costs, it is imposing unnecessary costs on RLECs to meet an outmoded regulatory requirement. Apparently the Commission is more concerned about the theoretical possibility of improper cost-shifting than about the actual increase in costs it is imposing. These costs are not insignificant. The Commission has previously acknowledged the significant "costs and inefficiencies" from maintaining structural separation between local telephone and long distance operations. These costs and inefficiencies include "operating these services independently, and maintaining duplicate sets of officers, directors, and employees."[19]

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[19] Report and Order and Memorandum Opinion and Order, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, 22 FCC Rcd 16440, FCC 07-159, ¶ 109 (2007) (*272 Sunset Order*).

The cost issue is of particular significance given that the Commission's USF Transformation Order places great emphasis on controlling rate-of-return company costs through the quantile regression analysis. The Commission states that it will "place limits on the [high-cost loop support] provided to carriers whose costs are significantly higher than other companies that are similarly situated, and support will be redistributed to those carriers whose unseparated loop cost is not limited by operation of the benchmark methodology."[20] Given this constraint, it is imperative that the Commission identify ways – such as the removal of structural separation obligations – to allow rate-of-return carriers to achieve this goal.

The imposition of such costs onto rate-of-return carriers is particularly unwarranted, since the Commission has not shown any actual harm resulting from the absence of structural separation. Indeed, for price cap companies and Bell operating companies, the Commission replaced such mechanisms with non-structural requirements. The same logic should be applied to rate-of-return companies since structural separation is a draconian solution to, at best, a hypothetical problem.

Applying the structural separation requirement to rate-of-return carriers can no longer be justified by market circumstances, and its continued enforcement has significant negative public policy consequences. As the number of consumers choosing to retain ILEC PSTN connectivity continues to decline – by more than ten percent a year, according to the Commission – the costs associated with maintaining the outdated structurally separate long-distance affiliates are spread

[20] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, FCC 11-161, ¶ 220 (2011).

across fewer and fewer consumers, proportionately increasing the burden on those consumers that remain on the legacy network.

If the Commission has concerns about cost-shifting between regulated and non-regulated services of rate-of-return companies, it should not disguise such concerns applicable to one service offered by a small segment of the RLEC industry with arguments and remedies dredged up from a telecommunications world that no longer exists. The structural separations requirements for all rate-of-return companies should be promptly eliminated.

V. The Industry Has Dramatically Changed Since the Requirement Was Imposed

Over the past decade, consumers have been engaged in an accelerating shift away from voice services provided by ILECs to voice services offered by wireless providers, cable incumbents, or voice over Internet protocol (VoIP) services provided by non-facilities based providers such as Vonage, Google or Skype.[21] Some of these voice services alternatives are offered to the public free of charge, and even those that do charge a fee make no distinction between local and long-distance calls. ILECs have been mimicking the pricing structure of these alternative voice services and offering voice bundles that include all-distance service. Increasing numbers of ILEC voice customers subscribe to an all-distance bundle.

Despite this reality, the Commission's decision in the *USTelecom Forbearance Order* continues to subject rate-of-return carriers to an inequitable and unjustifiable regulatory scheme requiring structural separation for long-distance facilities-based service, as if long-distance was a

[21] *See*, United States Telecom Petition for Declaratory Ruling, *Petition of USTelecom for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services*, pp. 24 – 42, WC Docket No. 13-3 (filed Dec. 19, 2012); *see also*, Public Notice, *Wireline Competition Bureau Seeks Comment on United States Telecom Association Petition for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services*, DA 13-21 (released January 9, 2013).

separate industry or distinguishable by consumers from subscription to voice service. Just as the younger generation of communications consumers would be befuddled when confronted with a rotary phone, they would be clueless as to the definition of "long distance" phone service.

VI. Rate-of-Return Carriers Subject to Structural Separation Lack the Ability and Incentive to Engage in Anticompetitive Behavior

It strains credulity to imagine that individual small RLECs have the ability to engage in behavior that would have any impact on competitors, whether those competitors were long-distance providers, cable companies or wireless providers. Indeed, it is not completely clear from the Commission's order, *which markets* it believes could harmed.

To the extent the Commission is concerned about the local market, average schedule companies lack any incentive to shift costs, the Commission's underlying concern about engaging in anticompetitive behavior. Grant of relief for average schedule companies should have been accomplished through the *USTelecom Forbearance Order* since they are in exactly the same position as price cap companies in that their costs are not tied to their rates. If and when an average schedule company with a facilities-based long distance operation wishes to convert to cost, the Commission could require that it approve such conversion, and add any necessary conditions at that time. This is a purely theoretical concern.

Similarly, the switched access rates of rate-of-return companies settling on a cost basis are essentially frozen and phase down under the *USF/ICC Transformation Order*,[22] so cost-shifting would have no impact on RLECs' interstate switched access rates. Special access rates

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[22] *See Connect America Fund, et al.,* Report and Order and Further Notice of Proposed Rulemaking, n. 1745, WC Docket No. 10-90, *et al*., FCC 11-161 (2011) *("USF/ICC Transformation Order").*

of such carriers are highly regulated, and few if any rate-of-return carriers qualify for any type of pricing flexibility with regard to such rates.

It is unclear which competitors the Commission is concerned about that need to be protected from the potential "exercise of exclusionary market power by independent ILECs."[23] In a typical rural area, the rate-of-return company provides no inputs into the local cable provider's network, and it is unlikely that the remote and low-density markets served by RLECs would draw the interest of competitive local exchange providers. It is therefore unclear how or against whom the rate-of-return company would exercise such exclusionary market power.

The Commission expresses concern that such carriers may have increased "incentives for cost misallocation and potential access charge rate increases," targeted at their competitors.[24] Again, it is unclear to which competitors the Commission is referring. For rural rate-of-return carriers, wireless providers are likely the only companies which could feasibly be subject to access charge rate increases, presumably for special access used to connect cell towers. However, since wireless competitors nationally average rates, it would be impossible for a small rate-of-return carrier to increase special access rates to the extent that such an increase would have an anti-competitive effect.

Moreover, rate-of-return carriers have no incentive to inflate special access rates. Because of the way rate-of-return carriers provide broadband service under Title II of the Communications Act, the ILEC portion of the company generally sells special access service to its affiliated ISP that offers broadband as a retail service. Improperly shifting long-distance costs

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[23] *Notice*, ¶ 237.
[24] *Id.*, ¶ 238.

to the ILEC which could result in higher special access rates would just increase costs to the ILEC's deregulated broadband ISP, making its core broadband product more expensive and less competitive.

Rate-of-return carriers must face competition from cable providers and wireless that are not subject to the same structural separation requirements. Unlike their unregulated competitors, RLEC regulation begets more regulation. Because their local and interexchange access services are regulated, the Commission feels the need to add further particularly onerous regulation in the form of the separate affiliate requirement to protect against cost-shifting. Both the cable and wireless providers in that same market are providing identical local and long-distance services to consumers without such regulation. In addition to imposing unnecessary and significant costs only on the rate-of-return carrier, such an arbitrary approach is inherently unfair.

This is also true of long distance providers since the Communications Act requires long distance companies to nationally average their long distance rates.[25] The RLECs at issue compete alongside national providers of such service, including T-Mobile, Sprint, Level 3, AT&T and Verizon. Even assuming that the RLECs in question somehow did manage to marginally increase access rates, there would be no effect on the rates of their long-distance competitors. Moreover, consumers have dramatically moved away from selecting a separate provider for their long distance services, choosing instead to rely upon the bundled all-distance service provided by wireline, wireless and cable providers. Potential wireless and cable company competitors are also generally larger and average rates as well. So even if the RLECs increased their rates it would not impact their cable and wireless competitors' rates.

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[25] *See*, 47 U.S.C. § 254(g).

VII. The Commission's Concerns About Cost-Shifting to Common Line Are Unwarranted

Both market conditions and the *USF/ICC Transformation Order* discourage rate-of-return companies from shifting costs to common line. Increased common-line costs are reflected in subscriber rates for voice service, making the RLEC's offering less competitive with those of wireless and other providers to whom RLECs are already losing an enormous amount of market share. In many if not most instances, this would result in a net loss of revenue by the RLEC.

Presumably the Commission's real concern is that costs improperly shifted will end up compensated through the universal service high-cost mechanisms currently available to rate-of-return companies. The High Cost Loop Support fund (HCLS) is subject to a cap, so any cost-shifting merely rearranges support within the fund without increasing its overall size. And, of course, shifting costs to common line increases the potential for a company to be impacted by the Quantile Regression Analysis caps. Similarly, while Interstate Common Line Support (ICLS) is not capped, the overall amount of high-cost support for rate-of-return carriers is subject to a budget, and therefore like HCLS, cost-shifting would merely rearrange support among rate-of-return carriers within that budget.

VIII. The Commission's Concerns Could be Addressed by Adopting Less Onerous Measures

Next to divestiture, structural separation is the most onerous regulatory remedy for the theoretical ills posed by the Commission in the *Notice*. The Commission is so concerned that rate-of-return carriers may have an incentive to engage in cost misallocation, price squeezing or non-price discrimination[26] that it imposes this draconian regulatory remedy on the smallest and

[26] *Notice*, ¶¶ 228 – 241.

most rural ILECs. At the same time the Commission is encouraging such ILECs to consolidate to achieve cost efficiencies, it seeks to preserve inefficient structurally separate long-distance affiliates based on rules rooted in a world gone by. The Commission's concerns are overstated, and could otherwise be addressed through less onerous means.

The Commission's *272 Sunset Order* adopted various non-structural safeguards to govern the provision of in-region, long distance services by the Bell Operating Companies.[27] In its *272 Sunset Order* the Commission adopted non-structural safeguards after concluding that they would "impose[] significantly fewer costs than the prior regulations."[28] The Commission has at its disposal various non-structural safeguards that can be used to address any of its concerns regarding forbearance from its structural separation requirements. As detailed in its *272 Sunset Order*, such safeguards can include: (1) special access performance metrics to prevent non-price discrimination in the provision of special access services; (2) imputation requirements to help monitor the provisioning of these services for possible price discrimination; (3) the offering of calling plans to protect residential customers who make few interstate, long distance calls; and (4) providing subscribers monthly usage information to enable them to make cost-effective decisions concerning alternative long distance plans. The Commission concluded in its *272 Sunset Order* that these measures would "adequately address" its marketplace concerns.[29] It also concluded that its more measured approach would allow the companies subject to the new

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[27] *272 Sunset Order*.
[28] *272 Sunset Order*, ¶ 109.
[29] *Id.*, ¶ 110.

framework to "develop and deploy innovative inter-LATA services that meet their customers' needs," thereby enabling them to become "more effective competitors."[30]

But even these remedies would be overkill in the context of the long-distance affiliates of small RLECs. They were designed for much larger providers that potentially could impact the marketplace. The Commission has a plethora of rules concerning accounting for regulated and deregulated activities, and NECA and the Commission regularly audit RLECs.

The Commission's rules are effective with respect to addressing potential cost-shifting between the other, potentially more significant, unregulated operations of RLECs such as the offering of video services. No one has suggested that other RLEC unregulated services should be subjected to structural separation. There is no reason, other than inertia from a historical situation no longer in existence, for structural separation to be applied to this particular unregulated service offered by only a few RLECs.

IX. Conclusion

For the foregoing reasons, the Commission should no longer apply its structural separation rules to rate-of-return ILECs.

Respectfully submitted,
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[30] *Id.*

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